Supreme Court, U.S.
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No. 94-158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

L. BATES,

Petitioner,

against

ROBERT WALKER,

Respondent.

JOHN MAHONEY,

Petitioner,

against

MICHAEL MAYS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MAYS IN OPPOSITION

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QUESTION PRESENTED

Whether an administrative "reversal" of a constitutionally infirm prison disciplinary proceeding bars any due process claim arising out of that proceeding regardless of whether the prisoner has already served the entire improperly imposed sentence in punitive confinement?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. Factual and Procedural Background 2

B. The Decisions Below 3

ARGUMENT 5

I. MAHONEY'S CLAIM THAT NEW YORK PROVIDES A MEANINGFUL POST-DEPRIVATION REMEDY WAS NOT RAISED IN THE COURT OF APPEALS AND IS NOT WORTHY OF REVIEW BY THIS COURT. 5

II. THE SECOND CIRCUIT'S DETERMINATION THAT MAYS SHOULD HAVE A REMEDY FOR THE DEPRIVATION HE SUFFERED IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL THE OTHER CIRCUITS. 7

Page

III. THE COURT BELOW CORRECTLY DECIDED THAT AN ADMINISTRATIVE REVERSAL WHICH OCCURS AFTER AN INMATE SERVES HIS ENTIRE SENTENCE IN PUNITIVE SEGREGATION IS NOT MEANINGFUL. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Alston v. *Debruyn*, 13 F.3d 1036 (7th Cir. 1994) 11

Battle v. *Barton*, 970 F.2d 779 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1300 (1993) 12

Caine v. *Hardy*, 943 F.2d 1406 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1474 (1992) 6, 14

Cleavinger v. *Saxner*, 474 U.S. 193 (1985) 4, 8

Daniels v. *Williams*, 474 U.S. 327 . . . . . 5, 7, 9

Easter House v. *Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991) 6, 14

EEOC v. *Federal Labor Relations Auth.*, 476 U.S. 19 (1986) 5

Ewell v. *Murray*, 11 F.3d 482 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 2112 (1994) 13

FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983) 5

Gilbert v. *Frazier*, 931 F.2d 1581 (7th Cir. 1991) . . . 11

Griffin-El v. *Delo*, ___ F.3d ___, No. 92-3166, 1994 WL 460801 (8th Cir. Aug. 26, 1994) 12

Harper v. *Lee*, 938 F.2d 104 (8th Cir. 1991) 12, 16

Heck v. *Humphrey*, 114 S. Ct. 2364 (1994) 10

Hudson v. *Palmer*, 468 U.S. 517 (1984) 5-8, 11, 13, 15

IRS v. *Federal Labor Relations Auth.*, 494 U.S. 922 (1990) 5

Katz v. *Klehammer*, 902 F.2d 204 (2d Cir. 1990) 6, 7

Lowe v. *Scott*, 959 F.2d 323 (1st Cir. 1992) 14

Mackey v. *Dyke*, 29 F.3d 1086 (6th Cir. 1994) 13

Mays v. *Mahoney*, 23 F.3d 660 (2d Cir. 1994) . . . 3, 16

McKinney v. *Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc) 13

Murphy v. *Collins*, 26 F.3d 541 (5th Cir. 1994) 10, 11

Parratt v. *Taylor*, 451 U.S. 527 (1981) 5-7, 11, 13-15

Patsy v. *Board of Regents*, 457 U.S. 496 (1982) 10

Patterson v. *Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986) 4, 14, 15

Ponte v. *Real*, 471 U.S. 491 (1985) 9

Posters 'N' Things, Ltd. v. *United States*, 114 S. Ct. 1747 (1994) 5

Rogers v. *Lodge*, 458 U.S. 613 (1982) 6

Rowe v. *Debruyn*, 17 F.3d 1047 (7th Cir. 1994) *reh'g denied and opinion amended*, 1994 U.S. App. LEXIS 10069 (May 5, 1994), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 1, 1994) (No. 94-249) 11

Russell v. *Scully*, 15 F.3d 219 (2d Cir. 1993) 3

Simmons v. *Chemung County Dep't of Social Servs.*, 770 F. Supp. 795 (W.D.N.Y.), *aff'd without opinion*, 948 F.2d 1276 (2d Cir. 1991) . . 6, 7

Smith v. *Maschner*, 899 F.2d 940 (10th Cir. 1990) 10, 13

Smith v. *Massachusetts Dep't of Correction*, 936 F.2d 1390 (1st Cir. 1991) 10

Superintendent v. *Hill*, 472 U.S. 445 (1985) 10

Walker v. *Bates*, 23 F.3d 652 (2d Cir. 1994) 4, 8, 16

Walker v. *Navarro County Jail*, 4 F.3d 410 (5th Cir. 1993) 11

Walker v. *Sumner*, 14 F.3d 1415 (9th Cir. 1994) 13

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 4, 5, 8-13

Young v. *Hoffman*, 970 F.2d 1154 (2d Cir. 1992) (per curiam), *cert. denied*, 114 S. Ct. 115 (1993) 3, 16

Young v. *Kann*, 926 F.2d 1396 (3d Cir. 1991) 13

Zar v. *South Dakota Bd. of Examiners*, 976 F.2d 459 (8th Cir. 1992) 14

Zinermon v. *Burch*, 494 U.S. 113 (1990) 5-7, 10, 13-15

Statutes

42 U.S.C. § 1983 *passim*

Articles

William Babcock, *Due Process in Prison Disciplinary Proceedings*, 22 B.C. L. Rev. 1009 (1981) 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MAYS IN OPPOSITION

Respondent Michael Mays submits this brief in opposition to petitioner John Mahoney's request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 29, 1994, which reversed the district court's dismissal of Mays's claims. The Second Circuit opinion is reported at 25 F.3d 660.

STATEMENT OF THE CASE

A. Factual and Procedural Background

Michael Mays, a prisoner in a New York State correctional facility, filed this action *pro se* under 42 U.S.C. § 1983, seeking redress for the deprivation of his Fourteenth Amendment right to due process of law during the course of a Tier III Superintendent's Hearing (the "Hearing") held at the Sing Sing Correctional Facility ("Sing Sing") on July 26, 1990. (MA 5-15.) The *pro se* complaint explains that Mays received no notice of the Hearing, no assistance in the preparation of his defense, no opportunity to attend or otherwise present a defense at the Hearing, including the opportunity to call witnesses, and that Mahoney, the hearing officer, was biased against him. (MA 5-15, 24-25.) None of the documents reviewed by the hearing officer indicated that Mays had knowingly and voluntarily waived these rights. (MA 33-37.) Nevertheless, at the conclusion of the Hearing, which lasted all of five minutes, Mahoney found Mays guilty of the charges, which Mays had been deprived of all opportunity to contest, and sentenced him to forty-five days in punitive keeplock confinement and loss of certain privileges. (MA 38-41.)

Mays first learned of the disciplinary proceeding when the hearing disposition sheet was left on his cell bars after the conclusion of the hearing. Two days later, he filed an administrative appeal of his sentence in which he explained that he had not received notice of the proceeding nor any opportunity to explain why the charge could not be true. (MA 10-15.) On September 12, 1990, after Mays had already served his *entire* sentence in segregation, Sing Sing Superintendent John P. Keane "reversed" Mahoney's disciplinary decision for "procedural error." (MA 42.)

B. The Decisions Below

In September of 1992, Mays moved for summary judgment as to the due process violations alleged in his complaint. (MA 22-28.) Mahoney filed a cross-motion for summary judgment on April 27, 1993. (MA 29-48.) Relying primarily on *Young* v. *Hoffman*, 970 F.2d 1154 (2d Cir. 1992) (per curiam), *cert. denied*, 114 S. Ct. 115 (1993), and *Russell* v. *Scully*, 15 F.3d 219 (2d Cir. 1993), defendant Mahoney argued that the administrative reversal of the Hearing he had conducted and the expungement of all references to the sentence he had imposed "cured" any due process violation he had committed.

By Report and Recommendation dated August 16, 1993 (the "Report"), Magistrate Judge James C. Francis rejected this argument and recommended that the parties' cross-motions be denied. (MA 49-62.) In the Report, the magistrate judge distinguished between administrative and punitive confinement and held that "[i]f Mr. Mays was subjected to administrative confinement, then the reversal on appeal cures any procedural due process violations he allegedly suffered. However, if the time he served was punitive, then the reversal on appeal would not cure any procedural defects, and the defendant would remain potentially liable for the deprivation." (MA 58.) On October 22, 1993, the district court (Cedarbaum, J.) issued a Memorandum Opinion and Order which declined to accept the magistrate judge's recommendations and instead held that regardless of whether Mahoney had imposed the forty-five day sentence "as penalty" and regardless of whether Mays's "punishment had ended" before the reversal, the reversal "cured any procedural defect that may have occurred." (MA 67-69.) Mays timely filed and served his Notice of Appeal on November 18, 1993. (MA 72-73.)

In a unanimous decision written by Judge Timbers and joined by Chief Judge Newman and Judge Pratt, *Mays* v.

Mahoney, 23 F.3d 660, 662 (2d Cir. 1994), the Second Circuit held that "[t]he court erred in granting Mahoney's motion for summary judgment since a reversal on administrative appeal does not cure the wrongful deprivation of a liberty interest resulting from a due process violation at a prisoner's disciplinary hearing." This holding relied primarily upon *Walker* v. *Bates*, 23 F.3d 652 (2d Cir. 1994), an opinion decided on the same day, which in turn relied on *Patterson* v. *Coughlin*, 761 F.2d 886, 890 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986), and this Court's opinions in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and *Cleavinger* v. *Saxner*, 474 U.S. 193 (1985). Neither the opinion below nor any of Mahoney's prior submissions or arguments discussed the cases or issues upon which Mahoney now relies in petitioning this Court.

ARGUMENT

I.

MAHONEY'S CLAIM THAT NEW YORK PROVIDES A MEANINGFUL POST-DEPRIVATION REMEDY WAS NOT RAISED IN THE COURT OF APPEALS AND IS NOT WORTHY OF REVIEW BY THIS COURT.

From the start, the parties and lower courts in this case have been concerned solely with the character of confinement pending administrative appeal under New York's prison regulations and the possibility of erasing, through such an appeal, the constitutional claims that arise out of punitive segregation imposed at a disciplinary hearing that lacked the procedural guarantees of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). While petitioner made one passing reference to *Zinermon* v. *Burch*, 494 U.S. 113 (1990), in his brief to the court of appeals (Appellee's Br. at 41), nowhere did he discuss the impact of that case on Mays's claims. Indeed, it would be far from surprising if the Second Circuit had "totally ignored" *Zinermon* (Pet. 12), and the two other cases that Mahoney now invokes, *Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*, *Daniels* v. *Williams*, 474 U.S. 327, and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), since these cases and the rule for which they stand were omitted completely from arguments, both written and oral, before the district court and the court of appeals.

This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted); *see*, *e.g.*, *Posters 'N' Things, Ltd.* v. *United States*, 114 S. Ct. 1747, 1755 (1994); *IRS* v. *Federal Labor Relations Auth.*, 494 U.S. 922, 933 (1990); *FTC* v. *Grolier, Inc.*, 462 U.S.

19, 23 n.6 (1983); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982). For the first time in this action, Mahoney seeks judicial review on the issues of whether his actions were "random and unauthorized" and whether New York's postdeprivation "remedy" is adequate. This Court should adhere to its normal practice and decline to review such belatedly hatched arguments.

Indeed, the practice of refusing to address issues not before the court of appeals is particularly appropriate in this case because if *Parratt* and *Hudson* do apply, which respondent submits they do not, the Second Circuit has an internal conflict that it has not had an opportunity to resolve. *See Katz* v. *Klehammer*, 902 F.2d 204, 207 n.1 (2d Cir. 1990); *Simmons* v. *Chemung County Dep't of Social Servs.*, 770 F. Supp. 795, 798-801 (W.D.N.Y.), *aff'd without opinion*, 948 F.2d 1276 (2d Cir. 1991). In *Katz*, a tenant-shareholder in a limited profit housing development sued under 42 U.S.C. § 1983 alleging that the managers of the development had deprived him of a protected property interest without due process of law. Citing *Parratt*, the Second Circuit dismissed this claim because any mismanagement by the defendants was "random and unauthorized" and because the plaintiff had adequate postdeprivation remedies in the form of an Article 78 proceeding and a state tort or breach of contract action. *Katz*, 902 F.2d at 206-07. Most notably, the *Katz* court interpreted *Zinermon* identically to the cases that petitioner cites as conflicting with the opinion below. *Id.* at 207 n.1 ("The defendants here are alleged to have violated various laws and regulations concerning public housing, and a State rule directing persons in their position to hold a hearing before violating any rule or regulation would be senseless."); *see Caine* v. *Hardy*, 943 F.2d 1406, 1415 (5th Cir. 1991) (en banc) (citing *Katz*), *cert. denied*, 112 S. Ct. 1474 (1992); *Easter House* v. *Felder*, 910 F.2d 1387, 1401 (7th Cir. 1990)

(en banc) (same), *cert. denied*, 498 U.S. 1067 (1991); *see also Simmons*, 770 F. Supp. at 798-801 (dismissing procedural due process claim brought under 42 U.S.C. § 1983 by owners and operators of day-care center against county department of social services because no predeprivation safeguards would have prevented the loss alleged and because plaintiffs had adequate postdeprivation state law remedies). If, as petitioner argues, the Second Circuit's implicit interpretation of *Zinermon* in this case conflicts with its interpretation in *Katz* (Pet. 10 n.6), the proper forum for resolution of such a conflict is the court where the conflict allegedly arose.

Furthermore, questions about an individual state's regulatory scheme and the various types of immunity that it opts to give its officials are not of national import. *Cf. Daniels* v. *Williams*, 474 U.S. 327, 333 n.1 (1986) (declining to decide whether possibility of sovereign immunity defense to tort suit under Virginia law renders remedy "inadequate" under *Parratt* and *Hudson*). Indeed, these questions belong in the first instance to the jurisdiction most familiar with their significance and application. In this case, that jurisdiction, the Second Circuit, was not given a chance to consider these issues now labeled important and worthy of this Court's review. For this reason alone, certiorari should be denied.

II.

THE SECOND CIRCUIT'S DETERMINATION THAT MAYS SHOULD HAVE A REMEDY FOR THE DEPRIVATION HE SUFFERED IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL THE OTHER CIRCUITS.

In 1974, this Court explained that prisoners like Mays who are deprived of certain specified procedures in their

disciplinary hearings may maintain actions for damages under 42 U.S.C. § 1983. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). This rule has retained its vitality notwithstanding the availability of administrative appeals and the possibility of administrative reversals. *See Cleavinger* v. *Saxner*, 474 U.S. 193, 203-07 (1985). Thus, the Second Circuit's ruling in this case stands for the unremarkable proposition that *Wolff* v. *McDonnell* remains good law.

Judge Miner in his majority opinion in *Walker* aptly observed that this Court, in *Cleavinger* v. *Saxner*, had already faced an almost identical factual situation to the one presented by Walker, and therefore by Mays. *Walker*, 23 F.3d at 656-57 (citing *Cleavinger* v. *Saxner*, 474 U.S. at 203-07, 211). In *Cleavinger*, inmates who had successfully appealed their improperly imposed sentences in disciplinary segregation were allowed to seek damages for the denial of due process that had caused them harm. The Court held that regardless of "the availability of administrative review at three levels (demonstrated by the relief obtained on review by these respondents at the first two levels)" qualified and not absolute immunity was sufficient to shield members of the disciplinary committee from liability for the deprivations they had caused. *Cleavinger*, 474 U.S. at 206-07. After citing *Hudson* v. *Palmer*, *id.* at 203, the *Cleavinger* Court explained:

> All the committee members need to do is to follow the clear and simple constitutional requirements of *Wolff* v. *McDonnell*, *supra*; they then should have no reason to fear substantial harassment and liability.

Id. at 207; *see Walker*, 23 F.3d at 656.

Other cases decided by this Court support the conclusion that state officials who intentionally deprive an inmate of his due process rights and thereby cause him to suffer punitive segregation are liable for damages under *Wolff*. For

example, in *Ponte* v. *Real*, 471 U.S. 491, 498-99 (1985), a plaintiff-inmate who administratively appealed his sentence of isolation and loss of good-time credits and succeeded in having that sentence reduced sought damages under 42 U.S.C. § 1983 for having been denied witnesses at his hearing. Now-Chief Justice Rehnquist explained:

> [t]o hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched for the denial of that right, either in the disciplinary proceeding itself *or if that proceeding be later challenged in court*, would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board. We think our holding in *Wolff* meant something more than that.

Id. at 499 (emphasis added). Similarly, in *Daniels* v. *Williams*, 474 U.S. at 327, the inmate-petitioner, in support of his claim that negligent conduct can give rise to a due process deprivation, cited as an example "the failure of a state to comply with the procedural requirements of *Wolff* v. *McDonnell*." *Id.* at 333. This Court rejected the petitioner's argument but validated *Wolff* by explaining that "the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause." *Id.* at 334.

Indeed, this Court has long assumed that disciplinary proceedings by prison officials should be subject to external scrutiny of the kind Mahoney now wishes to evade. It is precisely for that reason that *Wolff* requires a prison administrator to state the evidence upon which he rests his decision. 418 U.S. at 565; *see* William Babcock, *Due Process in Prison Disciplinary Proceedings*, 22 B.C. L. Rev.

1009, 1083 (1981). Furthermore, in *Superintendent* v. *Hill*, 472 U.S. 445, 454-56 (1985), this Court supplemented *Wolff* and held that due process is not satisfied unless a court finds that the prison disciplinary determination is supported by "some evidence."

Finally, this Court recently reconfirmed that a prisoner need not exhaust his available state remedies prior to seeking damages for a due process deprivation, so long as he is not challenging the lawfulness of his continuing confinement. *Heck* v. *Humphrey*, 114 S. Ct. 2364, 2369-70 (1994) (citing *Wolff* and *Patsy* v. *Board of Regents*, 457 U.S. 496, 501 (1982)). Even *Zinermon* v. *Burch*, upon which Mahoney relies so heavily, simply confirms the availability of a due process claim in this case by citing prison disciplinary proceedings as paradigmatic situations in which a predeprivation hearing is constitutionally required. *Zinermon*, 494 U.S. at 127-28 (citing *Wolff*, 418 U.S. at 557-58). In sum, the opinions below are wholly consistent with governing precedent, notwithstanding petitioner's claims to the contrary.

Nor is there any actual conflict among the circuits in decisions published after *Zinermon*. For example, in *Smith* v. *Massachusetts Dep't of Correction*, 936 F.2d 1390 (1st Cir. 1991), the First Circuit relied on *Wolff* to reverse the district court's dismissal of an inmate's procedural due process claim arising out of a prison disciplinary hearing where he was denied both witnesses and documentary evidence; the inmate was entitled to seek monetary damages because he "risked the loss of liberty entailed in isolation time, a sanction which he ultimately received." *Id.* at 1398-1401. The *Smith* court affirmed the dismissal of the inmate's malicious prosecution claim, however, because it found that he had an adequate remedy in state court. *Id.* at 1402.

Similarly, the Fifth Circuit, in *Murphy* v. *Collins*, 26 F.3d 541 (5th Cir. 1994), recently recognized that,

notwithstanding the availability of an administrative appeals procedure, an inmate who is "penalized by solitary confinement or loss of good time credit" following a disciplinary proceeding where his witnesses are excluded may maintain a due process claim under *Wolff*. *Id.* at 543 & nn.5-6. "Because Murphy was sentenced to [a form of administrative confinement] he was only entitled to the process due under the teaching of *Hewitt* v. *Helms*." *Id.* at 543. Notably, the *Murphy* court applied the rationale of *Parratt* and *Hudson* to bar that portion of the inmate's complaint which did not arise out of his disciplinary hearing. *Id.* at 543-44; *see also Walker* v. *Navarro County Jail*, 4 F.3d 410, 412 (5th Cir. 1993) (reinstating claim for damages by pretrial detainee who was placed in segregation following hearing that failed to comply with *Wolff*).

The Seventh Circuit too continues to recognize the vitality of *Wolff*. In *Gilbert* v. *Frazier*, 931 F.2d 1581 (7th Cir. 1991), for example, the court held that where a state "has established a definite, unqualified, nondiscretionary standard for determining when its prison officials may as a disciplinary measure take away a prisoner's right to the relatively greater liberty of ordinary confinement, compared to the approximation to solitary confinement that is segregation," the state also must provide a hearing that complies with *Wolff* before any punishment is imposed. *Id.* at 1582; *see also Rowe* v. *Debruyn*, 17 F.3d 1047, 1053 (7th Cir. 1994) (finding that suspended sentence of full year in segregation implicated liberty interest but rejecting due process claim because all *Wolff* procedures afforded), *reh'g denied and opinion amended*, 1994 U.S. App. LEXIS 10069 (May 5, 1994), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 1, 1994) (No. 94-249); *Alston* v. *Debruyn*, 13 F.3d 1036, 1042 & nn.2-3 (7th Cir. 1994) (distinguishing procedural requirements of administrative confinement at issue, including nonadversarial periodic review, from

procedural requirements of punitive confinement, which requires *Wolff* protections).

Likewise, the Eighth Circuit in *Griffin-El* v. *Delo*, ___ F.3d ___, No. 92-3166, 1994 WL 460801 (8th Cir. Aug. 26, 1994), recently cited *Wolff* for the proposition that an inmate can prevail on a procedural due process claim under 42 U.S.C. § 1983 if he demonstrates that he was deprived of a protected liberty interest without the constitutionally mandated processes. *Id.* at *2-3 n.3. Because the plaintiff "received adequate process," including notice and an opportunity to speak and present witnesses to a prison Adjustment Committee, prior to suffering a sanction, the court held that the sanction was "the product of informed decisionmaking" and an additional hearing "would have been superfluous for purposes of federal constitutional due process protection." *Id.* at *3; *see also Harper* v. *Lee*, 938 F.2d 104, 105-06 (8th Cir. 1991) (procedural defect in disciplinary hearing rectified by rehearing at which inmate afforded all protections but still found guilty; no due process claim because he "experienced no harm as a result of the initial denial of his [due process] right.").

Finally, the Eleventh Circuit also continues to require prison authorities to comply with the due process standards announced by this Court in *Wolff*. *Battle* v. *Barton*, 970 F.2d 779, 780 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1300 (1993). In *Battle*, the court explained that because "[d]ue process ensures fundamental fairness and protects against arbitrary governmental action" and because an inmate's mere presence at his hearing "serves both these goals," *Wolff* guarantees that presence unless the inmate's removal is logically related to institutional safety or correctional goals. *Id.* at 782-83.

Other circuit decisions that petitioner did not cite in discussing the alleged "intercircuit conflict" confirm the unanimity of the view that *Wolff* continues to govern

procedural due process claims arising out of prison disciplinary proceedings. *See, e.g., Walker* v. *Sumner*, 14 F.3d 1415, 1419-20 (9th Cir. 1994) (reinstating inmate's claim that improper witness denial at disciplinary hearing deprived him of due process under *Wolff*); *Ewell* v. *Murray*, 11 F.3d 482, 488 (4th Cir. 1993) ("The holding of *Wolff* teaches that before prisoners may be punished for misconduct . . . they must be given advance written notice of the charges against them, they must be allowed to call witnesses (if prison safety so allows), and the factfinders must issue a written statement as to the evidence relied upon and the reasons for the disciplinary action."), *cert. denied*, 114 S. Ct. 2112 (1994); *Young* v. *Kann*, 926 F.2d 1396, 1398-1402 & n.3 (3d Cir. 1991) (holding that inmate who was segregated following hearing and administrative appeal stated due process claim under *Wolff* for denial of documentary evidence); *Smith* v. *Maschner*, 899 F.2d 940, 943-46 (10th Cir. 1990) (dismissing prisoner's property deprivation claim under *Parratt* and *Hudson* but reversing dismissal of disciplinary due process claim under *Wolff*); *see also Mackey* v. *Dyke*, 29 F.3d 1086 (6th Cir. 1994) ("*Parratt* does not require dismissal of all § 1983 actions where the state provides a postdeprivation process for remedying the alleged deprivation. . . . [I]t cannot be said that it would have been either impossible or impracticable for the defendants to have provided predeprivation process. . . . It was error to apply *Parratt* without reference to the limitations the Supreme Court has placed upon its application.").

Mahoney's attempt to portray this case as presenting a square conflict about how to interpret *Zinermon* should be rejected for several additional reasons. First, the decisions that he cites to support this conflict rest solidly on their individualized and wholly distinguishable facts. *See, e.g., McKinney* v. *Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc) (rejecting state employee's claim that his employment was

terminated without due process and refusing to examine motives of allegedly biased decisionmaker since pretermination hearing contained all requisite procedural safeguards); *Zar* v. *South Dakota Bd. of Examiners*, 976 F.2d 459 (8th Cir. 1992) (rejecting psychologist's claim that medical board deprived him of due process by deciding to adopt hearing officer's recommendation that state-issued license be revoked); *Lowe* v. *Scott*, 959 F.2d 323 (1st Cir. 1992) (rejecting obstetrician's claim that his right to practice medicine was improperly abridged because of misrepresentations by single member of Hospital Board); *Caine* v. *Hardy*, 943 F.2d 1406 (5th Cir. 1991) (finding that anesthesiologist failed to state cognizable due process claim when his hospital staff privileges were suspended because allegedly partisan decisionmakers followed state-mandated procedures), *cert. denied*, 112 S. Ct. 1474 (1992); *Easter House* v. *Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc) (rejecting adoption agency's claim that state regulators who allegedly conspired in an attempt to revoke its license deprived agency of property without due process), *cert. denied*, 498 U.S. 1067 (1991). None of these cases involves a claim by an individual who suffered a loss of liberty precisely because he was denied all the procedural protections that the Constitution guarantees to him.

Second, as already mentioned, the Second Circuit adheres to the same interpretation of *Zinermon* that Mahoney urges, that is, where a state actor commits a random and unauthorized act and thereby deprives an individual of his liberty or property, there is no procedural due process claim if adequate state remedies are available. (*See* Pet. 9-10 & n.6.) The Second Circuit simply differs with Mahoney but agrees with the unanimously-held view that prison disciplinary hearings require pre- and not postdeprivation process and that *Parratt* is therefore inapposite. For example, in *Patterson* v. *Coughlin*, 761 F.2d 886, 890 (2d

Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986), the court explained that

> [a]llegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes. . . . Unlike the deprivation of property that occurred in *Parratt*, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. In fact, he was *given* a hearing, albeit a deficient one. Thus, the deprivation of liberty was neither "random" nor "unauthorized."

Id. at 891-92 (emphasis in original). Even petitioner recognized the absurdity of disputing that his actions were "unauthorized" when he stated to the court of appeals that the position he urged was entirely consistent with the holding of *Patterson*. (Appellee's Br. at 40-41.)

In sum, as Mahoney implicitly recognized when he crafted his discussion below, the rule announced in *Parratt* and applied in *Hudson* and *Zinermon* is not applicable to this case. Consequently, the split to which petitioner points is a fallacy, and the resulting absence of any conflict compels denial of the writ.

III.

THE COURT BELOW CORRECTLY DECIDED THAT AN ADMINISTRATIVE REVERSAL WHICH OCCURS AFTER AN INMATE SERVES HIS ENTIRE SENTENCE IN PUNITIVE SEGREGATION IS NOT MEANINGFUL.

The only issue presented by this case is whether a state can punish a prisoner first and provide him with process later. In *Mays* and *Walker*, the Second Circuit brought its case law into accord with the only other circuit to consider this issue. *See Harper*, 938 F.2d at 105-06; *see also Young* v. *Hoffman*, 970 F.2d 1154, 1156 (2d Cir. 1992) (per curiam), *cert. denied*, 114 S. Ct. 115 (1993). The court correctly decided that the administrative "reversal" of Mays's constitutionally infirm prison disciplinary proceeding did not bar his due process claim arising out of that proceeding since Mays already had served his entire improperly imposed sentence in punitive confinement. *Mays* v. *Mahoney*, 23 F.3d at 662. To hold otherwise would approve shutting the barn door after the cow has wandered out. The Constitution commands a tighter rein on threats to liberty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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